IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 898 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE Y.B.BHATT
and
Hon'ble MR.JUSTICE J.R.VORA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KISHORBHAI RAMABHAI PATEL

Versus

STATE OF GUJARAT

Appearance:
MR RM PARMAR for Appellant

CORAM : MR.JUSTICE Y.B.BHATT
and
MR.JUSTICE J.R.VORA

Date of decision: 08/07/2002

ORAL JUDGEMENT (Per : MR.JUSTICE J.R.VORA)

1. This appeal is preferred by the appellant original accused in Sessions Case No. 32/2000 against the judgment and order dated 25.10.2001 of the Additional

Sessions Judge, Valsad, Camp at Navsari, convicting the accused for the offences punishable under Sections 376, 307 and 394 of the IPC and sentencing him for 10 years imprisonment and fine of Rs. 2,000/- in default 2 years simple imprisonment; 5 years imprisonment and fine of Rs.2,000/- in default one year simple imprisonment; and imprisonment of three years and fine of Rs.1,000/- and in default simple imprisonment of three months, respectively.

2. The unfortunate incident occurred on 21st November, 1989 at village Onjal, Taluka Jalapore, District Navsari. The complaint is lodged by Vindobhai Ramubhai Patel, father of victim Julisa. According to him, with this family, he resided at Navafaliya in village Onjal, was doing agriculture. He had three daughters aged respectively 12 years, 10 years and 5 years. Victim of this case is his daughter aged 5 years named as Julisa. On 21st November, 1999 after taking lunch, Vindobhai along with his daughter Dimple had been to his field for agriculture operation. He returned at 5'O clock in the evening. At that time, his wife Pushpa asked him whether Julisa had accompanied the complainant to the field. Complainant denied and thereafter his wife conveyed that from that afternoon Julisa was not traceable and she had gone away somewhere. A thorough search was made by the complainant and thereafter complainant went to village Kalyan where his sister was staying to inquire whether Julisa had come to Kalyan. Along with the complainant one Nareshbhai Sadashiv also accompanied. When they reached at village Kalyan, they received a telephonic message from village Onjal that Julisa was found and complainant should immediately return home. While complainant reached his home at Onjal, he came to know that Julisa was taken to local Doctor and, therefore, he decided to go to the local Doctor one Mr. Maneklal. While he was going to the Doctor, on way, his wife and Julisa and other neighbours met him. Wife of the complainant informed the complainant that Julisa was required to be taken to Navasari Civil Hospital while Julisa though she was in very bad shape informed to the complainant that while she had been to toilet in noon at 2'O clock, accused Kishor thrust dust in her mouth and after taking out her knicker, mounted her. There were injuries on private parts of Julisa and there were other injuries on her body. Complainant took Julisa to Navsari Civil Hospital where she was treated and on informing to the Police by Doctor of the Civil Hospital, Navsari, a complaint came to be lodged against the present appellant. Investigation was entrusted to PSI Solanki of Navsari

Police Station and it was also revealed that Julisa was wearing golden ear rings which were also stolen by the accused. It was also revealed that after committing rape accused had thrown Julisa in a dried well and she was found from the well. Julisa was examined by the Doctor at Navsari Hospital. Accused was apprehended and was examined by the Doctor of the Navsari Hospital. In pursuance of the investigation, a charge sheet for the above said offences punishable under Sections 376, 307 and 394 of the IPC was submitted in the court of learned JMFC, Navsari and on committal of the case to the Court of Sessions, the same was registered as Session Case No. 32/2000 in the Court of Sessions Judge at Navasari. A charge in respect of the above offences was framed against the accused vide Exh. 4 to which he pleaded not guilty.

3. After hearing both the parties, learned Additional Sessions Judge by his above said judgment and order, convicted the present appellant. Being aggrieved, this Appeal is preferred by the original accused - appellant.

4. We have carefully scrutinised and gone through the evidence. At Exh. 30 as witness No.7 Julisa victim of the incident has been examined. She has stated that the accused had seduced her on the pretext of giving her almonds and had taken her out of the village. She stated that she was forced to take off her knicker. Accused had also beaten her. Thereafter she had slept and the accused had thrust dust in her mouth. In her cross-examination she stated that her mother had told her about the deposition to be given in the court. She also stated that she was injured because she was thrown in the well. At Exh.10 father of the victim, complainant, has been examined and he has stated what he had narrated in the complaint. He supports in toto the version which he had narrated in the complaint which is at Exh.11. Except some allegations of enmity with the accused which complainant denied in toto, nothing came out from the cross examination to disbelieve this witness. In support, his wife Pushpaben is examined at Exh. 29. She states that after her husband went to village Kalyan, she and other neighbours went to the sim of village and from a dried and abandoned well, the girl Julisa was found. On inquiry, the girl categorically stated to this witness that she was beaten by the accused and after forcibly taking out her knicker accused had mounted her and thrown her thereafter in the dried well.

5. Both of them are very important witnesses and

there is no any reason to disbelieve the version given by parents of the girl nor anything could be shown by the defence that there was enimity between the father of the girl and the accused to the extent that it was probable that accused would be involved by such parents in a false case of rape on a child aged 5 to 6 years.

6. Weighty and thumping evidence against the accused in the case is the medical evidence. Three doctors have been examined i.e. Dr. Maneklal Naryanbhai at Exh.25, who treated the girl at first instance and gave the primary treatment. Dr. Ushaben Ajaykumar Sharma, Medical Officer of Nasvsari Civil Hospital is examined at Exh.52, who had treated victim girl at Navsari and third doctor is Dr. Soniya Tekchandani, Medical Officer of Navsari Hospital, is examined at Exh.31, who had examined the accused. Dr. Maneklal stated that he was General Practitioner and at about 6'O clock in the evening on 21.11.1999, victim girl was brought before him for treatment. He had given the primary treatment and had advised to take her to Civil Hospital at Navsari. At Exh.26, a certificate to that extent has been given by him, which is on record.

7. Dr.Ushaben an independent and uninterested witness, examined at Exh. 52, states that the victim girl was taken before her at about 8.30 in the evening on 21.11.1999. She informed Jalalpore Police Station. She stated that the victim girl and her aunt gave the history that the accused committed rape on the victim girl. The Doctor observed that she was confused, frightened and was speaking with difficulties. She had in all 7 external injuries including a bite injury on her tongue. In addition to external injuries she had very extensive injuries on her private parts, as under :-

Int.Examinations:

1) Vulva, perinaeum, buttocks, oozing of blood from vulva (blood stained).
2) Blood clots cleaned.
3) One linear abrasion about 2.5 cm on each side between labia minora & majora in upper most part. Fresh.
4) Small tear seen at 9,1 1, 3'O clock hymenal memb.
5) Perinaeum teased upto 2 cms depth, it reaches 1 cm off anus. Oozing of blood presents.
6) Post vaginal local tear upto just 1 cm off cx, it starts from the perinaeum,

depth was upto rectal fuerosa, soft tissues were severely bruised.

7) Vaginal local teased 1- 2 cm length, transverse 14, peritoneum bruised but intact.

8) X-ray chest shows MAO

9) Sonography shows - blood in pelvic cavity.

10) Valval swab, vaginal swab, urethral swab, anal swab collected and sent for FSL.

11) Child admitted, undergone surgery (1)BT given.

She found collection of blood in pelvic cavity through sonography. She specifically opined that the injury that victim had in her private parts could only be caused by forcible penetration of male organ. She had found semen on her clothes. It was also stated that in case of delayed treatment in such injuries, death could be the result. In cross-examination by the defence except probabilities nothing is put to the witness. Though this witness has admitted that there were possibilities of injuries on the male organ if the rape is committed by grown male on minor girl. Except that, nothing could be extracted from her cross-examination to shaker her deposition.

8. Another medical witness is examined by the prosecution is at Exh. 31 Dr. Soniya Tekchandani who had examined the accused on 22.11.1999 at 12.15 p.m. After examining the accused, Dr. Soniya Tekchandani opined that the accused was capable of committing sexual act. A very important fact which is revealed through the evidence of this witness is found from the case history which accused stated before the Doctor, that he had taken girl Julisa out of house at 2.30 p.m. and he committed this assault (rape), he has not changed the clothes after intercourse. This is the clear admission of guilt on behalf of the accused to the extent of extra judicial confession. Dr. Soniya Tekchandani was put to strict cross-examination by the defence but the defence was not able to dislodge the opinion of Dr. Tekchandani nor could show that the history recorded in the form of extra judicial confession by this witness was not reliable or credible.

9. All the three medical witnesses clearly appear to be credible, truthful and reliable. There is no reason to disbelieve this weighty evidence against the accused. It is proved by medical evidence that the victim, who is 5 years old, was brutally raped and thrown in the dried well. The injury described by Dr. Ushaben denotes that

the injuries to the private parts of the victim could only be caused by forceful rape. However, defence was not able to show why the medical evidence of the three Doctors should not be believed. The other supporting witness Kalaben Indrajitbhai is examined at Exh.38. She stated before the Court that she knew the accused. She was doing the business of selling fish and the accused was also dealing in catching fish from the sea. On 21st November, 1999 while she was selling fish in the market, the accused came to her and stated that his mother was sick and he was in need of Rs. 500/- and accused handed over to the witness golden ear rings which were proved to be the ear rings of the victim girl which she was wearing at the time of commission of offence. After persuasion, accused anyhow took Rs.100 from this witness and handed over the golden ear rings to Kalaben. She faced searching cross-examination of the defence, but nothing could be extracted to disbelieve the version of Kalaben. One of the panchas of the panchnama, Shalimbhai Khajabhai, Exh. 37, supports the panchnama. Exh.35 by which this ear rings were recovered from witness Kalaben. Though the other panch witness of panchnama Exh.35 has not supported the prosecution case but evaluating the evidence of witness Kalaben as well as witness Shalimbhai - Exh. 37, the fact is clearly established that the accused sold the golden ear rings of the victim girl to witness Kalaben and obtained Rs. 100/-.

10. Learned counsel for the appellant attempted to focus our attention on the evidence of victim girl and argued that she is a tutored witness as has been revealed by the cross-examination. It was argued that victim girl also could not clearly depose about the rape.

11. While appreciating the evidence in such cases one must not forget that when a child witness of 5 years old deposes before the court in respect of rape, then it must be borne in mind that child does not know about the human anatomy. She cannot be attributed prudence or even discretion to understand the act committed with her nor she could not be expected to vividly narrate the gruesome sexual act committed with her. Evidence must be appreciated on the basis of the hard facts of the life. However, the victim deposes that her knicker was forcibly taken out and then accused mounted her. Enough facts of rape having been committed upon her is revealed in the evidence thereafter established of medical experts. It is clear that she must have become unconscious due to unbearable pain, which is supported by Dr. Ushaben at Exh. 52. Therefore, on this count, the case of the

prosecution cannot be disbelieved especially when three medical officers have supported the case of the prosecution to the full extent and the deposition of parents of the victim girl Julisa is fully reliable. The prosecution could also establish that the golden ear rings of the victim girl was removed by the accused. Above all, accused himself confessed before Dr. Sonia Tekchandani that he had committed rape on the victim girl Julisa. Neither the defence could dislodge this evidence on the ground of improbabilities or untruthfulness nor the defence could suggest that the parents of a child of 5 years would involve the accused in a case of rape due to some enemity or for some other reasons. We do not find either in the cross examination of the defence or in the explanation of the accused anything except denial, and suggestions of enmity, which cannot find any favour to the accused in the circumstances above.

12. After screening the evidence of each of the witnesses and documents produced, we find that the learned Trial Judge came to the right conclusion to convict the accused for the offences punishable under Sections 376, 307 and 394 of the Indian Penal Code and sentenced him to the imprisonment and fine, as above said. We do not find any reason to interfere with the judgment and reasoning of the learned Trail Court convicting the appellant.

13. In the result, the Appeal stands dismissed at the admission stage.

(Y.B. Bhatt, J.)

(J.R. Vora, J.)

p.n.nair